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97TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT No. 97-624

COMPLETED

IMPLEMENTING THE CONVENTION ON THE PHYSICAL PROTECTION OF NUCLEAR MATERIAL

JUNE 24, 1982.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. HUGHES, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 5228]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5228) to amend title 18 of the United States Code to implement the Convention on the Physical Protection of Nuclear Material, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment strikes out all after the enacting clause of the bill and inserts a new text which appears in italic type in the reported bill.

PURPOSE OF THIS LEGISLATION

H.R. 5228, as reported by the Committee, would amend chapter 39 of title 18 of the United States Code (relating to explosives and other dangerous devices). The primary purpose of the bill, as reported, is to implement the Convention on the Physical Protection of Nuclear Material. Exec. , Senate 96th Cong., 2d sess., (May 9, 1980), I.A.E.A. Doc. Infcirc/Rev. 1 (May 1980). In addition, the bill proscribes certain other activities relating to the security of nuclear material. Even though those activities are not within the scope of the Convention, the Committee believes that they are essential to render the protection of nuclear material complete.

BACKGROUND

The Convention on the Physical Protection of Nuclear Material (hereinafter cited as "the Convention") was a United States initiative, proposed by the Secretary of State in 1974. In two provisions of the 1978 Nuclear Non-Proliferation Act, Congress also called for such a convention. The Convention was adopted at a Vienna meeting of government representatives on October 26, 1979, and was signed by the United States on March 3, 1980. On July 14, 1981, the Senate Foreign Relations Committee voted 16–0 to approve ratification of the Convention (H. 96–2, 97th Cong., 1st sess., 127 CONG. REC. D 850 (1981)) and on July 30, 1981, the full Senate voted to approve ratification by a vote of 98–0. (H. 96–2, 97th Cong., 1st sess., 127 CONG. REC. S 8808–8810 (1981)).

The Convention establishes general levels of physical security to be provided during the international shipment of nuclear material. It mandates the cooperation of the parties in the recovery and return of stolen nuclear material, and requires them to enact legislation to punish certain serious violations of nuclear material security. Article 7 of the Convention sets forth certain acts which the parties shall make punishable, and Article 8 sets forth the circumstances in which the parties shall, or may, exercise their jurisdiction to prosecute offenders. H.R. 5228 implements both Articles 7 and 8.

Article 2 of the Convention limits its scope to nuclear material that is "used for peaceful purposes while in international nuclear transport." Thus, for example, nuclear material used for military purposes is not within the purview of the Convention. With two major exceptions, crimes involving nuclear material for non-peaceful purposes are also not within the purview of H.R. 5228.

One such exception involves offenses committed within the United States' territorial, special maritime, special territorial, or special aircraft jurisdiction. Proposed § 831(c)(1). The Congress' power to regulate foreign and interstate commerce and the national defense is sufficient to authorize the assertion of such criminal jurisdiction. U.S. CONST., art. I § 8, cl. (1) and cl. (3). A second exception relates to offenses committed by nationals of the United States. Proposed § 831(c)(2). Under well recognized principles of international law, the nationality or national character of the person committing the offense is alone sufficient to authorize the assertion of criminal jurisdiction by the country of which the defendant is a national. *Harvard Research in International Law: Jurisdiction with Respect to Crime*, 29 AM. J. INT'L. L., Supp. I, 435–445 (1935). *See generally* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 10–36 (1965).

In most prosecutions under proposed section 831, jurisdiction will be based on the Congress' authority under the Constitution to regulate foreign and interstate commerce and the national defense. In such cases, it will not be necessary to rely for jurisdictional authority on either principles of international law or the Convention. Thus, in such cases, jurisdiction need not be limited to nuclear material for peaceful purposes.

HISTORY OF THE ACT

The previous Administration submitted proposed implementing legislation for the Convention to the Congress in August 1980, but no action was taken on it, apparently because of the lateness in the legislative session. In April of 1981, the Reagan Administration submitted another proposed bill to the Congress, with only minor drafting changes made in the first proposal. The current Administration, like its predecessor, strongly supports enactment of such implementing legislation. *See, e.g.*, testimony of Richard Kennedy, Under Secretary of State for Management, before the Subcommittee on Crime of the House Committee on the Judiciary, (November 12, 1981). The Administration recognizes "the urgency of taking measures to deal with the worldwide threat of terrorism. The Convention on the Physical Protection of Nuclear Material is an important step which addresses one facet of a most serious problem." *Id.* The Committee agrees.

On September 9, 1981, at the request of the Reagan Administration, Peter W. Rodino, Jr. of New Jersey, Chairman of the House Committee on the Judiciary, introduced H.R. 4442. The bill was referred to the Subcommittee on Crime of the House Committee on the Judiciary, which held one day of hearings on the bill on November 12, 1981. The Subcommittee received testimony from Richard Kennedy, Under Secretary of State for Management and United States representative to the International Atomic Energy Agency; Robert Burnett, Director of the Division of Safeguards, United States Nuclear Regulatory Commission; and Troy Wade, Deputy Assistant Secretary of Energy for Defense Programs.

On December 8, 1981, William J. Hughes of New Jersey, Chairman of the Subcommittee on Crime, and Mr. Rodino, introduced H.R. 5129, which carried forward the substantive provisions of the Administration's proposed bill, but which redrafted H.R. 4442 to clarify its meaning and to correct certain technical problems and clerical errors.

On December 9, 1981, the Subcommittee held one day of markup on H.R. 4442 and H.R. 5129. The Subcommittee amended H.R. 5129 in one respect (*see* discussion *infra*), and reported a clean bill. That bill, H.R. 5228, was introduced on December 15, 1981 by Mr. Hughes, Mr. Rodino, and Robert McClory of Illinois, the ranking Republican member of the Committee on the Judiciary.

On June 15, 1982, the full Judiciary Committee held one day of markup on H.R. 5228. The Committee adopted an amendment by Mr. Hughes and Harold Sawyer of Michigan, the ranking Republican member of the Subcommittee on Crime, raising the penalty for certain acts made illegal by the bill. It rejected an amendment by James F. Sensenbrenner, Jr., of Wisconsin, to impose the death penalty for certain violations of proposed section 831. *See* discussion *infra*. The Committee ordered the bill reported to the full House by a voice vote.

SECTION-BY-SECTION ANALYSIS

Section 1 of the bill sets forth its short title: The Convention on the Physical Protection of Nuclear Material Implementation Act of 1981.

Section 2 of the bill amends title 18 of the United States Code to add a new section 831. It describes the conduct that constitutes a violation

of the statute and sets forth the circumstances in which such conduct may be prosecuted. Section 2 is intended to satisfy the United States' obligations under Articles 7 and 8 of the Convention.

The Convention itself uses certain descriptive terms, such as "theft," "robbery," and "embezzlement," that in the context of modern American law are confusing and imprecise. For example, modern United States law defines "theft" to include "embezzlement." H. REP. No. 96–1396, accompanying H.R. 6915, the Criminal Code Revision Act of 1980, 96th Cong., 2d sess. at 305–313 (1980) (hereinafter cited as H. REP. No. 96–1396), and accompanying citations. The Convention itself uses the words separately, and in two different subsections, which implies that is describes two completely different crimes. *See* Article 7 (1)(b) and (1)(c). In addition, the word "theft" occurs approximately 130 times in title 18 of the United States Code, and is defined differently almost every time. H. REP. No. 96–1396, *supra*, at 305–313, and accompanying citation. To cite another example, "robbery" is prohibited in section (1)(b) of Article 7 of the Convention, and "a demand for nuclear material by threat or use of force" is prohibited in section (1)(d). Again, the Convention's separation of these two terms implies that they are two separate crimes. But, at least where such demands result in a taking, they are not. In American Federal law, robbery *is* the taking of property by threat or use of force. *Jolly* v. *United States*, 170 U.S. 402, 404 (1898). *Accord*, *Deal* v. *United States* 274 U.S. 277, 283 (1927), *Collins* v. *McDonald*, 258 U.S. 416, 420 (1922).[1]

Since the Convention does not define the terms it uses, and there is no clear written history of Convention proceedings to fill this void, the Committee decided that it was more precise and consistent with American law to simply describe the conduct to be prohibited, without attempting to label such conduct as "theft," "robbery," etc. Therefore, to describe and prohibit such conduct, subsection (a) of proposed section 831 in large part uses the language from and format of H.R. 6915, the revised Federal criminal code approved by the Committee on the Judiciary last Congress.[2] Subsection (a) prohibits all of the conduct that Article 7 of the Convention requires be prohibited; it simply uses different language to do so.

(a) *State of Mind*

Consistent with the general practice in title 18 of the United States Code, paragraphs (a)(2), (3), (5), (6), and (8) require that the actor's state of mind be "knowing." An actor has a "knowing state of mind" when the actor has an awareness of the nature of the conduct, an awareness of or a firm belief in the existence of the circumstance and an awareness of or a firm belief in the substantial certainty of the result. *See United States* v. *Bailey*, 444 U.S. 394, 404–05 (1980).

The requisite state of mind in paragraphs (a)(1) and (a)(4) is "intentional." [3] "Intentional" means more than that the actor voluntarily engaged in conduct or caused a result. Such conduct or result must have been the actor's conscious objective. *See id.* at 404–05.

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[1] Where such demands are unsuccessful, they constitute attempted robbery, proscribed by Article 7(1)(f) of the Convention, and punishable under paragrable (a)(7) of the bill.

[2] H.R. 6915 has been introduced in the 97th Congress as H.R. 1647 by Sam Hall of Texas and Thomas N. Kindness of Ohio.

[3] Paragraph (a)(7) proscribes attempts. Consistent with common law and current Federal statutory law, it requires a specific intent.

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Because of the more generalized actions that are proscribed in paragraphs (a)(1) and (a)(4), the Committee felt that a slightly higher state of mind was appropriate.

In accordance with modern criminal code drafting techniques, *see* Model Penal Code § 202(4), H. REP. No. 96–1396, *supra*, at 34, the Committee intends that listed states of mind apply to circumstances and results, as well as to conduct. For example, in proposed section 831(a)(3), a person must not only know that he or she is using force (conduct), but must also know that he or she is taking nuclear material (a result of the use of force) from the person or presence of another (a circumstance).

It is not necessary that the actor know the actual composition of the nuclear material affected (as defined in proposed section 831(e)), but only that the material with which the actor is dealing is nuclear material.

(*b*) *Elements of the Offense* [4]

Paragraph (a)(1) carries forward Article 7(1)(a) of the Convention. This paragraph punishes someone who, without lawful authority, intentionally receives, possesses, uses, transfers, alters, disposes of, or disperses any nuclear material and thereby causes death or serious bodily injury, or substantial property damage, or who knows that circumstances exist which are likely to cause such death, bodily injury, or property damage.

Paragraph (a)(1) preserves the exception set forth in the Convention: if such actions are performed by someone with "lawful authority," they are not criminal. Thus, for example, employees of the federal government or of Nuclear Regulatory Commission licensees, whose job it is to perform any of the actions otherwise made illegal in paragraph (a)(1), are protected from criminal prosecution if their conduct is within the scope of their employment.

As in the Convention, subparagraph (a)(1)(A) requires that the prohibited actions must actually cause death or serious bodily injury or substantial property damage. Subparagraph (a)(1)(B) does not require such a result, but punishes an offender who recklessly ignores circumstances indicating that such actions will likely product such results. Obviously, the circumstances must be those that relate to the offense set forth in paragraph (a) of subsection (1).

Paragraph (a)(2) punishes theft of nuclear material. The actor must have an intent to deprive another of nuclear material, and must knowingly take nuclear material without authority; use, dispose of, or transfer nuclear material of another without authority; or obtain nuclear material of another by fraud. Modern definitions of theft include "embezzlement" (set forth in subparagraph (a)(2)(B)) and "taking by fraud or false pretenses" (set forth in subparagraph (a)(2)(C)). H. REP. No. 96–1396, *supra*, at 305. Paragraph (a)(2) thus carries forward part of Article 7 (1)(b) of the Convention, which prohibits theft, and Article 7 (1)(c), prohibiting embezzlement or fraudulently obtaining nuclear material.

Paragraph (a)(3) carries forward those parts of Article 7(1)(b) and (1)(d) of the Convention that prohibit robbery of nuclear material.

[4] Although the actor's "state of mind" is also an element of the offense, it is discussed separately above.

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It prohibits an actor from knowingly using force or threats of imminent bodily injury and as a result obtaining nuclear material.

Paragraph (a)(4) carries forward the rest of Article 7(1)(d) of the Convention by prohibiting an actor from intentionally intimidating any other person and as a result obtaining nuclear material. Hence, paragraph (a)(4) prohibits a form of extortion.

Paragraph (a)(5) punishes "nuclear blackmail" and thereby carries forward Article 7(1)(e)(ii) of the Convention. It prohibits an actor from knowingly threatening to engage in either theft or robbery with intent to compel any person, international organization, or governmental entity to do or refrain from doing any act. The term "international organization" is defined in subsection (f), paragraph (2) of proposed section 831. "Governmental entity" means any organization formed or operated under local, state, or Federal law to provide governmental services. This broad definition ensures that all public officials, no matter what their governmental function, are protected from being blackmailed into performing or refraining from performing their official duties.

Paragraph (a)(6) carries forward Article 7 (1)(e)(i) of the Convention by prohibiting knowing threats to use nuclear material to cause death or serious injury to any person or substantial property damage. Such threats are punishable only when the surrounding circumstances indicate that the threat may reasonably be understood as an expression of serious purposes. *Watts* v. *United States*, 394 U.S. 705, 707 (1969); *United States* v. *Portillo*, 431 F. 2d 293 (4th Cir. 1970), *aff'd en banc*, 438 F. 2d 13 (1971). Threats that constitute purely political speech are constitutionally protected. Threats that are purely rhetorical, *i.e.*, unlikely to be believed because of the individual's apparent inability to execute the threat, are not worthy of Federal prosecution. This language thus makes clear that threats falling into either category are not within the purview of paragraph (a)(6).[5]

Paragraph (a)(7) carries forward Article 7(1)(f) of the Convention by prohibiting attempts to carry out certain forms of conduct prohibited elsewhere in the bill. Paragraph (a)(7) punishes attempts to commit the offenses set forth in paragraphs (1), (2), and (3) of subsection (a) of proposed section 831. To this extent, the coverage of the Convention and of the bill are the same.

However, paragraph (a)(7) also prohibits intentional attempts to intimidate any person and thereby obtain nuclear material. Since Article 7(1)(f) of the Convention does not proscribe such attempts, it might seem that in this one respect, the bill expands upon the Convention's scope. This is not the case. Article 7(1)(d) of the Convention, which proscribes such intimidation, does not require a result. It prohibits such intimidation whether or not the offender actually obtains the nuclear material. Proposed section 831 punishes the completed offense in paragraph (a)(4), and the uncompleted offense, or attempt, in this paragraph. Proposed section 831 is therefore in all respects consistent with the Convention's proscription of attempts, and does not expand that proscription.

[5] Of course, the common law "public authority" defense protects public officials such as the President of the United States from prosecution for threatening to use nuclear material. H. Rep. No. 96-1396, *supra*, at 67-69, and accompanying citations.

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Paragraph (a)(8) of the bill prohibits conspiracies to perform any of the conduct punished under paragraphs (a) (1), (2), (3), and (4).[6] This paragraph carries forward Article 7(1)(g) of the Convention, which requires that the parties punish "an act which constitutes participation" in an offense prohibited by the Convention. Although the Convention's "participation" language relates to all of the conduct the Convention proscribes, H.R. 5228 is limited to conduct set forth under paragraphs (a)(1) through (a)(4). The Committee chose not to punish inchoate crime when free speech and related issues are involved, since no governmental interest is actually harmed if the crime is not completed. Thus, the offenses prohibited in paragraphs (a) (5) and (6) are excluded from conspiracy liability. In addition, the concept of a conspiracy to attempt an offense, which the Convention proscribes, makes no sense, especially since H.R. 5228 punishes conspiracies to perform the completed offenses. Thus, the conduct punished by paragraph (a)(7) is also excluded from paragraph (a)(8).

Although 18 U.S.C. § 371 prohibits conspiracies to commit any offense against the United States, and thus appears to cover all conspiracies to violate proposed section 831, section 371 does not explicitly state whether it applies extraterritorially, *i.e.*, outside the United States. Paragraph (a)(8) may be unnecessary in light of section 371, at least insofar as it reaches conduct that occurs within the territorial jurisdiction of the United States. However, it does ensure that where the completed offense that occurs extraterritorially would be prosecutable, conspiracies to commit that offense that occur extraterritorially will also be covered.[7]

Although the language of the Convention proscribing "acts of participation" might also be taken to include accomplice liability, proposed section 831 does not directly punish accomplices to any of the offenses otherwise punished. Section 2 of title 18 of the United States Code describes accomplice liability. It provides that anyone who is an accomplice to an offense is punishable as a principal. It does not create a separate offense, as section 371, relating to conspiracy, does. Thus, no question of extraterritorial applicability arises in this context. When an actor commits an act extraterritorially that amounts to accomplice liability, and that act is proscribed by this bill, the actor is punishable as a principal under 18 U.S.C. § 2. Insofar as the Convention requires that acts of complicity be prohibited as "acts of participation," United States law already reaches that result, and no additional language in this bill is necessary.

(c) *Penalties*

The Convention mandates that each party provide "appropriate penalties" for the offenses it prohibits and that such penalties take into account the "grave nature" of such offenses. Article 7(2). Therefore, in accordance with the Convention and the recommendation

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[6] The conspiracy provision was added by an amendment offered by Mr. Hughes in Subcommittee.

[7] Insofar as current Federal case law requires that there be a substantial Federal interest in the investigation or prosecution of such an offense, Ford v. United States, 273 U.S. 593, 622 (1927); Rivard v. United States, 375 F.2d 882, 886 (5th Cir. 1967); United States 1. Downing, 51 F.2d 1030 (2d Cir. 1931), this requirement is satisfied here. The United States' participation in the Convention, and the subject matter of the Convention, demonstrate that interest.

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of the Reagan and Carter Administrations, most violations of section 831 are punishable by a maximum of twenty years in prison, a $250,000 fine, or both. The Committee agreed with the assessment of the Convention that these are grave offenses, and therefore believes that the lengthy term of imprisonment and high fine are justified.

There are two exceptions to this level of punishment. First, the defendant may be sentenced to any term of years or to life in prison if, while committing an offense under paragraphs (1) or (3) of subsection (a), the offender "knowingly engages in any conduct and thereby recklessly causes the death of or serious bodily injury to any person" and does so "under circumstances manifesting extreme indifference to the life of an individual." This penalty enhancement provision is limited to paragraphs (1) and (3) because the acts prohibited by those paragraphs are serious crimes against the person. The paragraphs not covered by the penalty enhancement cover less serious crimes, where the likelihood of violence is much less. Because the possible penalty is so severe, the Committee believes that it should be limited to those circumstances in which the defendant consciously disregards a grave risk of serious danger to other persons. It has therefore taken language from the section of the proposed Federal criminal code punishing murder, Criminal Code Revision Act of 1980, H.R. 6915, § 2301(a)(2) 96th Cong., 2d sess. (1980), to describe this state of mind.

The term "serious bodily injury" is defined in subsection (f)(3) of the bill. The definition is self-explanatory.

Second, the Committee believes that the penalty for conspiracies to violate proposed section 831 should be consistent with the penalty set forth in 18 U.S.C. § 371. The actions constituting a conspiracy are often so far removed from actual commission of an offense that culpability and risk of harm are less, and punishment should also be. Where the actor participates in the completed offense or attempts to do so, the actor may be prosecuted for attempt under paragraph (a)(7), for complicity under 18 U.S.C. § 2, or for the completed offense itself. In these situations, the more severe penalty would apply.

During consideration of the bill by the Committee, James F. Sensenbrenner, Jr. of Wisconsin offered an amendment to permit the death penalty to be imposed for certain violations of proposed section 831. A number of Members voiced their concern that no hearings had been held on whether the death penalty was appropriate in the context of this particular bill, and if so, how such a penalty should be drafted and in what circumstances it should be imposed. Opponents of the amendment expressed concern that the death penalty is an issue fraught with controversy and, unless precisely and carefully drafted, could be subject to constitutional attack.[8] In addition, some Members

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[8] The moral, constitutional, and practical arguments, both for and against the death penalty, were thoroughly discussed in hearings during the 95th Congress. Hearing on H.R. 13360 before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 95th Cong., 2d sess., serial number 74 (1978). In the 97th Congress, the issue was once again thoroughly debated. Hearing on S. 114 before the Senate Committee on the Judiciary, 97th Cong., 1st sess., serial number J–97–13 (1981).

The language in the amendment proposed by Mr. Sensenbrenner is based on S. 114. Statement of James F. Sensenbrenner, Jr., Markup on H.R. 5228 before the House Committee on the Judiciary (June 15, 1982). S. 114 would impose the death penalty for a number of violations of the Federal criminal laws. S. 114 has been attacked as unconstitutional on both substantive and procedural grounds in recent testimony before the House Judiciary Subcommittee on Criminal Justice. *See, e.g.*, testimony of John J. Donohue, Professor of Law, Yale University, for the American Civil Liberties Union, Hearings on a Federal Death Penalty Statute before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 97th Cong., 2d sess. (March 17, 1982).

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noted that the constitutionality of the death penalty has been subject to intense judicial scrutiny, causing existing death penalty statutes not to be enforced, and that this situation will in all likelihood continue. Therefore, it was argued, until this situation changes, it makes little sense to attempt to enact a death penalty statute in the context of this bill.

Under these circumstances, the Committee voted 20–8 to defeat the amendment offered by Mr. Sensenbrenner.

(d) Basis for Federal Jurisdiction

Article 8 of the Convention sets forth the circumstances [9] in which a party to the Convention has jurisdcition to prosecute an offense under Article 7. In implementing Article 8, subsection (c) of proposed section 831 provides four circumstances in which the United States may exercise jurisdiction over offenses proscribed by subsection (a). The first three carry forward the three mandatory circumstances of Article 8(1) (a) and (b) and Article 8(2) of the Convention. The fourth is a discretionary provision set forth in Article 8(4) of the Convention which, in light of the gravity of the offenses involved, the Committee chose to adopt.

First, pursuant to paragraph (c)(1) of proposed section 831, the United States has jurisdiction when the offense is committed in the United States or in its special maritime and territorial jurisdiction, or in its special aircraft jurisdiction. Second, when the defendant is a national of the United States, the United States has jurisdiction under paragraph (c)(2). Third, paragraph (c)(3) permits the United States to prosecute an offender who is found in the United States after the offense has been committed, no matter where the offense was committed. Consistent with the Convention's scope, this provision is limited to circumstances where the nuclear material involved was in use, storage, or transit for peaceful purposes. Fourth, pursuant to paragraph (c)(4), the United States may prosecute when the nuclear material is in transit to or from the United States. This provision is also limited to nuclear material used for peaceful purposes.

Only the third and fourth provisions are necessarily limited in scope to nuclear material used for peaceful purposes. *See* discussion below. The first and second jurisdictional bases go beyond the coverage of the Convention by permitting the United States to exercise jurisdiction when the nuclear material is used for military, or other non-peaceful, purposes. It is clear that, even without the authorizing Convention, the Congress, under its power to regulate interstate commerce and the national defense, may authorize the United States to exercise its jurisdiction in these circumstances.

Paragraphs (c) (3) and (4) are primarily directed toward the exercise of extraterritorial jurisdiction. Ordinarily, the United States is reluctant to exercise its jurisdiction in the circumstances of paragraph (c)(3), when all of the conduct comprising the offense was committed in another country, and the defendant entered the United States at a later point in time. In this case, the Committee chose to provide for extraterritorial Federal criminal jurisdiction because of the nature of the conduct and the fact that the exercise of jurisdiction is recognized under principles of international law. The "universality prin-

[9] As distinguished from the circumstances that may be an element of the offense, it is not necessary to prove a state of mind for a circumstance setting forth the jurisdictional basis for prosecuting the offense. H. Rep. No. 96–1396, *supra*, at 35.

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ciple" of international law permits the exercise of jurisdiction in this instance. Application of the universality principle depends on which nation has custody of the offender. The universality principle is generally accepted in the international community only in tye case of internationally recognized crimes. Note, *Extraterritorial Jurisdiction—Criminal Law*, 13 HARV. INT. L.J. 346–47, n. 1 (1972). In this context, the Convention provides that international recognition. Since the Convention's scope is limited to nuclear material used for peaceful purposes, so must paragraph (c)(3) be so limited.

Similarly, the exercise of extraterritorial jurisdiction under paragraph (c)(4) is justified under principles of international law. The exercise of extraterritorial jurisdiction here is justified by the "protective principle," based on the national interest that is injured by the offender. The conduct must have a direct and significant effect on an important interest of the nation seeking to prosecute, and the conduct must be "generally recognized as a crime under the law of states that have reasonably developed legal systems." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §33 (1965). Because it relies on the Convention for such recognition, the fourth provision must also be limited in scope to nuclear material for peaceful purposes.

(e) Assistance by the Military and Department of Defense Personnel

H.R. 5228 departs from the Convention in another instance. Subsection (d) sets forth an exception to the "posse comitatus" prohibition against using the military in civilian law enforcement. 18 U.S.C. § 1385. Because of the inherent importance of protecting the world against unauthorized uses of nuclear material, the Committee feels that such an exception is necessary.

The Committee recently approved an exception to the "posse comitatus" prohibition in another context, when it permitted limited use of the military to assist in law enforcement. 10 U.S.C. § 371–378.

Subsection (d) permits exactly the same kinds of assistance to be rendered, by simply referring to those sections of title 10 of the United States Code. The kinds of assistance that are available are defined in 10 U.S.C. §§ 371–373. Pursuant to 10 U.S.C. § 371, the military may provide relevant information collected during the normal course of military operations to Federal, State, or local law enforcement officials. Section 372 of title 10 permits the military to make available any equipment, base facility, or research facility to any Federal, State, or local civilian law enforcement officials for law enforcement purposes. Pursuant to 10 U.S.C. § 373, members of the military may be assigned to train Federal, State, and local civilian law enforcement officials to operate and maintain equipment made available under section 372, and to provide expert advice relevant to any assistance rendered by the military under these sections. Subsection (d) broadens the scope of assistance in only one way. It permits the Secretary of Defense to provide such assistance through any Department of Defense personnel, rather than just through military personnel. Subsection (d) also incorporates by reference 10 U.S.C. § 376, which precludes assistance that would adversely affect the military preparedness of the United States, and section 377, which permits the Secretary of Defense to issue regulations providing for reimbursement.

Subsection (e) provides an additional exception to the "posse comitatus" prohibition and also expands upon the kinds of assistance

available under sections 371–373 of title 10. If an "emergency situation" exists, and if this country's military preparedness will not be adversely affected by the provision of such assistance, then this broader kind of assistance may be rendered by the Secretary of Defense through any Department of Defense personnel.

Subparagraph (e)(3)(A) defines "emergency situation" as one where the situation poses a serious threat to the interests of the United States, and in which enforcement of the law would be seriously impaired without such assistance, and in which civilian law enforcement personnel are unable, for whatever reason, to enforce the law.

Subparagraph (e)(4) defines the kinds of assistance that Department of Defense personnel may render in an emergency situation. Such personnel may conduct arrests, searches, and seizures for violations of proposed section 831, and may perform any other activity that is incidental to the enforcement of section 831, or to protecting persons or property from conduct that violates section 831. While the assistance that may be rendered is broadly defined, it may be rendered only in those limited circumstances meeting the definition of "emergency situation."

Paragraphs (e)(5) and (6) permit the Secretary of Defense to require reimbursement for such assistance, and restrict the Attorney General from delegating the authority to request such assistance to anyone below the level of Assistant Attorney General.

The Committee is fully aware that exceptions to the "posse comitatus" prohibition involving military personnel as participants in civilian law enforcement activities must be narrow and should be authorized only when absolutely necessary. Such an exception was found to be appropriate in the context of violations of the narcotics, immigration, and customs laws. 10 U.S.C. § 373. The Committee believes that protecting the security of nuclear material is of equal, if not greater, importance. Thus an exception is clearly justified here, as are the expansions the bill makes upon the exception set forth in title 10.

(f) Definitions

Subsection (f) of proposed section 831 defines "international organization", "nuclear material", "bodily injury", and "serious bodily injury."

Section 3 of H.R. 5228 amends 18 U.S.C. § 1116(b)(5), which implements the United Nations Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. (1975), T.I.A.S. No. 8532 (effective Feb. 20, 1977). The definition of "international organization" in section 1116(b)(5) is technically deficient, in that it does not reach a public organization created pursuant to treaty or other agreement under international law, and of which the United States is not a member, such as the European Economic Community. The definition of "international organization" in H.R. 5228 has been clarified to meet the concerns of the State Department. This bill therefore also amends section 1116(b)(5) so that it is consistent with H.R. 5228 and is accurate in scope.

[10] The Committee is aware that exceptions to the posse comitatus laws have been made in several other contexts. H. Rep. No. 97–71, Part 2. Report on Department of Defense Authorization Act of 1982, 97th Cong., 1st sess. (1981), at 6, and accompanying citations. That the exception set forth in proposed section 831 is drafted differently is not intended to have any effect on the interpretation of those other exceptions.

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Oversight Findings

The Committee makes no oversight findings with respect to this legislation.

In regard to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Operations.

New Budget Authority

In regard to clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, H.R. 5228 creates no new budget authority or increased tax expenditures for the Federal Government.

Inflationary Impact Statement

Pursuant to clause 3(l)(4) of rule XI of the Rules of the House of Representatives, the Committee finds that the bill will have no foreseeable inflationary impact on prices or costs in the operation of the national economy.

Federal Advisory Committee Act of 1972

The Committee finds that this legislation does not create any new advisory committees within the meaning of the Federal Advisory Committee Act of 1972.

Cost Estimate

In regard to clause 7 of rule XIII of the Rules of the House of Representatives, the Committee agrees with the cost estimate of the Congressional Budget Office and estimates that no additional cost to the government will be incurred as a result of enactment of this bill.

Congressional Budget Office Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, D.C., June 21, 1982.

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 5228, the Convention on the Physical Protection of Nuclear Material Implementation Act of 1982, as ordered reported by the House Committee on the Judiciary, June 14, 1982.

The bill defines and establishes penalties for crimes involving nuclear materials. Based on this review, CBO estimates that enactment of this legislation will result in no additional costs to the Federal Government.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

Alice M. Rivlin,
Director.

Changes in Existing Law Made by the Bill, As Reported

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman) :

TITLE 18, UNITED STATES CODE

* * * * * * *

PART I—CRIMES

* * * * * * *

CHAPTER 39—EXPLOSIVES AND OTHER DANGEROUS ARTICLES

Sec.

[831. Definitions.
[832. Transportation of explosives, radioactive materials, etiologic agents, and other dangerous articles.
[833. Marketing packages containing explosives and other dangerous articles.
[834. Regulation by Interstate Commerce Commission.
[835. Administration.]
831. Prohibited transactions involving nuclear materials.
836. Transportation of fireworks into State prohibiting sale or use.

§ *831. Prohibited transactions involving nuclear materials*

(a) Whoever, if one of the circumstances described in subsection (c) of this section occurs—

(1) without lawful authority, intentionally receives, possesses, uses, transfers, alters, disposes of, or disperses any nuclear material and—

(A) thereby causes the death of or serious bodily injury to any person or substantial damage to property; or

(B) knows that circumstances exist which are likely to cause the death of or serious bodily injury to any person or substantial damage to property;

(2) with intent to deprive another of nuclear material, knowingly—

(A) takes and carries away nuclear material of another without authority;

(B) makes an unauthorized use, disposition, or transfer, of nuclear material belonging to another; or

(C) uses fraud and thereby obtains nuclear material belonging to another;

(3) knowingly—

(A) uses force; or

(B) threatens or places another in fear that any person other than the actor will imminently be subject to bodily injury;

and thereby takes nuclear material belonging to another from the person or presence of any other;

(4) intentionally intimidates any person and thereby obtains nuclear material belonging to another;

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(5) with intent to compel any person, international organization, or governmental entity to do or refrain from doing any act, knowingly threatens to engage in conduct described in paragraph (2)(A) or (3) of this subsection;

(6) knowingly threatens to use nuclear material to cause death or serious bodily injury to any person or substantial damage to property under circumstances in which the threat may reasonably be understood as an expression of serious purposes;

(7) with intent to commit an offense described under paragraph (1), (2), (3), or (4) of this subsection engages in conduct which constitutes substantial step toward the commission of such offenses; or

(8) knowingly agrees with one or more other persons, all the parties to the agreement having intent that an offense under paragraph (1), (2), (3), or (4) of this subsection be committed, to engage in the conduct that is required for the intended offense, if any of the persons so agreeing intentionally engages in any conduct in furtherance of such offense;

shall be punished as provided in subsection (b) of this section.

(b) The punishment for an offense under—

(1) paragraphs (1) through (7) of subsection (a) of this section is—

(A) a fine of not more than $250,000; and

(B) imprisonment—

(i) for any term of years or for life if, while committing an offense under paragraph (1) or (3) of subsection (a) of this section, the offender, under circumstances manifesting extreme indifference to the life of an individual, knowingly engages in any conduct and thereby recklessly causes the death of or serious bodily injury to any person; and

(ii) for not more than 20 years in any other cases; and

(2) paragraph (8) of subsection (a) of this section is that provided for an offense under section 371 of this title.

(c) The circumstances referred to in subsection (a) of this section are that—

(1) the offense is committed in the United States or the special maritime and territorial jurisdiction of the United States, or the special aircraft jurisdiction of the United States (as defined in section 101 of the Federal Aviation Act of 1985 (49 U.S.C. 1301));

(2) the defendant is a national of the United States, as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101);

(3) at the time of the offense the nuclear material is in use, storage, or transport, for peaceful purposes, and after the conduct required for the offense occurs the defendant is found in the United States, even if the conduct required for the offense occurs outside the United States; or

(4) the conduct required for the offense occurs with respect to the carriage of a consignment of nuclear material for peaceful purposes by any means of transportation intended to go beyond the territory of the state where the shipment originates begin-

ning with the departure from a facility of the shipper in that state and ending with the arrival at a facility of the receiver within the state of ultimate destination and either of such states is the United States.

(d) The Attorney General may request assistance from the Secretary of Defense under chapter 18 of title 10 in the enforcement of this section and the Secretary of Defense may provide such assistance in accordance with chapter 18 of title 10, except that the Secretary of Defense may provide such assistance through any Department of Defense personnel.

(e)(1) The Attorney General may also request assistance from the Secretary of Defense under this subsection in the enforcement of this section. Notwithstanding section 1385 of this title, the Secretary of Defense may, in accordance with other applicable law, provide such assistance to the Attorney General if—

(A) an emergency situation exists (as jointly determined by the Attorney General and the Secretary of Defense in their discretion); and

(B) the provision of such assistance will not adversely affect the military preparedness of the United States (as determined by the Secretary of Defense in such Secretary's discretion).

(2) As used in this subsection, the term "emergency situation" means a circumstance—

(A) that poses a serious threat to the interests of the United States; and

(B) in which—

(i) enforcement of the law would be seriously impaired if the assistance were not provided; and

(ii) civilian law enforcement personnel are not capable of enforcing the law.

(3) Assistance under this section may include—

(A) use of personnel of the Department of Defense to arrest persons and conduct searches and seizures with respect to violations of this section; and

(B) such other activity as is incidental to the enforcement of this section, or to the protection of persons or property from conduct that violates this section.

(4) The Secretary of Defense may require reimbursement as a condition of assistance under this section.

(5) The Attorney General may delegate the Attorney General's function under this subsection only to a Deputy, Associate, or Assistant Attorney General.

(f) As used in this section—

(1) the term "nuclear material" means material containing any—

(A) plutonium with an isotopic concentration not in excess of 80 percent plutonium 238;

(B) uranium not in the form of ore or ore residue that contains the mixture of isotopes as occurring in nature;

(C) uranium that contains the isotope 233 or 235 or both in such amount that the abundance ratio of the sum of those isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature; or

(D) uranium 233;

(2) the term "international organization" means a public international organization designated as such pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288) or a public organization created pursuant to treaty or other agreement under international law as an instrument through or by which two or more foreign governments engage in some aspect of their conduct of international affairs;

(3) the term "serious bodily injury" means bodily injury which involves—

(A) a substantial risk of death;

(B) extreme physical pain;

(C) protracted and obvious disfigurement; or

(D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty; and

(4) the term "bodily injury" means—

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of a function of a bodily member, organ, or mental faculty; or

(E) any other injury to the body, no matter how temporary.

* * * * * * *

CHAPTER 51—HOMICIDE

* * * * * * *

§ 1116. Murder or manslaughter of foreign officials, official guests, or internationally protected persons

(a) * * *

(b) For the purposes of this section:

(1) "Family" includes (a) a spouse, parent, brother or sister, child, or person to whom the foreign official or internationally protected person stands in loco parentis, or (b) any other person living in his household and related to the foreign official or internationally protected person by blood or marriage.

(2) "Foreign government" means the government of a foreign country, irrespective of recognition by the United States.

(3) "Foreign official" means—

(A) a Chief of State or the political equivalent, President, Vice President, Prime Minister, Ambassador, Foreign Minister, or other officer of Cabinet rank or above of a foreign government or the chief executive officer of an international organization, or any person who has previously served in such capacity, and any member of his family, while in the United States; and

(B) any person of a foreign nationality who is duly notified to the United States as an officer or employee of a foreign government or international organization, and who is in the United States on official business, and any member of his family whose presence in the United States is in connection with the presence of such officer or employee.

(4) "Internationally protected person" means—

(A) a Chief of State or the political equivalent, head of government, or Foreign Minister whenever such person is in a country other than his own and any member of his family accompanying him; or

(B) any other representative, officer, employee, or agent of the United States Government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection against attack upon his person, freedom, or dignity, and any member of his family then forming part of his household.

(5) "International organization" means a public international organization designated as such pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288) *or a public organization created pursuant to treaty or other agreement under international law as an instrument through or by which two or more foreign governments engage in some aspect of their conduct of international affairs.*

* * * * * * *

ADDITIONAL VIEWS OF MESSRS. SAWYER AND McCLORY ON H.R. 3228

The urgent need for legislation addressing the criminal misuse of nuclear materials is beyond dispute. For that reason, we opposed an amendment to H.R. 5228 which would impose the death penalty for certain reprehensible offenses included in the bill. This reluctantly cast vote was not intended as a vote against the death penalty. We support capital punishment for appropriate crimes and where it is imposed under constitutionally mandated procedures. It was, rather, a vote in favor of countering nuclear terrorism in a realistic and expeditious manner.

Article 7(2) of the Convention on the Physical Protection of Nuclear Material, which, to no one's surprise, was unanimously ratified by the Senate last year, obliged this country to criminalize certain activities and to make them punishable by "appropriate penalties" which take into account the "grave nature" of the offenses. Obviously, when we consider the almost unthinkable crimes covered by H.R. 5228, the strongest penalties permitted by our Constitution should be provided. Under ideal circumstances, we would choose to include the death penalty as an alternate punishment for homicide-related offenses involving great moral turpitude. However, the political controversy generated by that provision, and consequent delay, must be balanced against regrettably slight likelihood that the death penalty would ever be imposed. There are currently hundreds of convicts on death row, yet only a handful have actually been executed in recent years. Despite the merits of the death penalty, we simply do not feeel that the benefits accruing from its inclusion in this bill would outweigh the unavoidable political hazards.

The penalties provided in the bills originally proposed by the Administration and reported by the Subcommittee were unquestionably deficient and failed to comply with our treaty obligations. For that reason, we successfully supported an amendment to H.R. 5228 which would increase the maximum term of imprisonment from twenty years to life where "extreme indifference" to human life is manifested. We believe that this is a workable and fair alternative to the death penalty. Life imprisonment sentences are currently being imposed and executed in our criminal justice system. The death penalty is not. A life sentence, accompanied by a realistic expectation that it will be imposed, is a more likely deterrent to nuclear terrorism than the death penalty. The latter can be viewed by an offender as easily avoided due to endless appeal and society's reluctance to impose it.

Again, our vote against the amendment offered by the gentleman from Wisconsin should not be viewed out of context as a vote against the death penalty *per se*. Our support of the bill under a procedure

which will preclude the death penalty amendment on the floor similarly stems from a belief that the legislation should be enacted as soon as possible. Of course, it is our hope that the leadership of this Committee will schedule prompt hearings on and markup of death penalty legislation relating to all appropriate federal criminal offenses, including those created by this bill. In the meantime, we urge our colleagues to support prompt passage of H.R. 5228, in the form in which it was reported by the Committee.

HAROLD S. SAWYER.
ROBERT MCCLORY.

ADDITIONAL VIEWS OF HON. HENRY J. HYDE ON H.R. 5228

As Voltaire observed so wisely centuries ago, we do not live in the "best of all possible worlds," and this is sadly true of our political system. If democracy in its purest and most perfect form was characteristic of this body, responses to crimes involving nuclear terrorism would not only be more prompt, but would most likely include the death penalty as the most appropriate punishment for these despicable acts. Regrettably, some would prefer inaction to a response which includes a narrow and constitutional provision allowing capital punishment.

I, for one, cannot in good conscience countenance such a sacrifice. For that reason alone, I voted against the death penalty amendment offered by the gentleman from Wisconsin. Similarly, while I strongly believe that H.R. 5228 should be considered on the floor of the House under an open rule which would permit adequate discussion and amendment, I will not oppose the bill if it is considered under suspension of the Rules. There is an urgent need for legislation against nuclear terrorism, albeit imperfect.

I heartily concur in the Views expressed by six of my Judiciary Committee compatriots that, on the merits, some of the offenses created in H.R. 5228 ought to be made punishable by death if a jury believes that justice so requires. This, of course, would only occur after a finding that the defendant is guilty beyond a reasonable doubt and consideration of relevant aggravating and mitigating factors. The failure to include this option leaves us with an unconscionable and ludicrous incongruity.

In 1974, Congress chose to make the hijacking of an airplane punishable by life imprisonment or death, "where death results." 49 U.S.C. 1472 (i) and (n). In response to a succession of Supreme Court cases, protective procedures, including a special penalty hearing, were prescribed for imposition of the latter. 49 U.S.C. 1473(c). If H.R. 5228 is enacted in its present form, this Congress will have chosen to make a disastrous air crash generated by hijacking punishable by death, but not the ultimate cataclysm—the obliteration of an American metropolis.

In choosing to oppose the death penalty in this bill, I empathize with the Chairman and Ranking Minority Member of the Subcommittee, whose willingness to consider this issue on its merits was painfully evident during Committee debate. Their determination in advancing H.R. 5228 toward enactment deserves our high praise and the gratitude of the Administration and the American people. I urge my colleagues to support the bill reported by the Committee in an effort to send a bill to the President's desk with dispatch. Further delay is simply intolerable.

HENRY J. HYDE.

ADDITIONAL VIEWS OF MESSRS. SENSENBRENNER, HALL, MOORHEAD, KINDNESS, McCOLLUM, AND SHAW, ON H.R. 5228

On January 18, 1982, five Soviet-made antitank rockets were fired at a French nuclear power station, scoring direct hits. Ten days later, flares were fired at a nuclear power station near Chicago with the warning that the "next attack will be real."

In January, 1979, a disgruntled employee stole 150 pounds of uranium from a fuel-processing plant in Wilmington, North Carolina, and attempted to extort $100,000 from his employer.

In 1965, Atomic Energy Commission inspectors discovered hundreds of pounds of highly enriched uranium missing from an Apollo, Pennsylvania processing plant. The whereabouts of the missing materials has never been ascertained, although it was rumored at one time that they may have been diverted for use by a foreign government.

In July, 1975, the city of New York received a note stating that "we have successfully designed and built an atomic bomb * * * on Manhattan Island. * * * We have enough plutonium and explosives for the bomb to function. This device will be used at 6:00 P.M. July 10 unless our demands are met." The ransom package was never claimed.

These frightening incidents are just a few of many. In the last decade, over sixty threats to unleash nuclear materials have been made in the United States. While no device has ever been detonated, the dissemination of information about nuclear devices and reactions, such as the *Progressive* magazine articles several years ago, increases the prospects for disaster in the all-too-near future. The urgent need for international and internal protective measures is thus clear. To that end, this country wisely chose to participate in the international Convention on the Physical Protection of Nuclear Material, which obligates its signatories to take appropriate steps to ensure the protection of such material. The Senate, without a single dissent, consented to that Convention in July of last year.

The Convention correctly envisions that criminal law enforcement will be an essential element in the protection of nuclear material. It therefore requires each party to make punishable "by appropriate penalties which take into account their grave nature" certain dangerous activities involving nuclear material, such as homicide, theft and extortion. Using the vehicle of H.R. 5228, the Administration and this Committee have judiciously proceeded to criminalize those offenses at the federal level, thus fulfilling half of our commitment under the Convention. The remaining half—the obligation to provide penalties commensurate with the seriousness of the offense—was ignored in the bill reported by the Subcommittee and given only slight recognition in the amendment adopted by the Committee.

H.R. 5228, as reported by the Subcommittee on Crime, provided a maximum penalty of twenty years imprisonment and/or a $250,000 fine for every offense, except conspiracy. While that penalty might be appropriate for offenses involving mere threats, where the defendant intentionally kills another or creates a grave risk of death with that result, it is woefully insufficient. Under the Subcommittee's bill, a nuclear terrorist who intentionally removed New York City from the map could receive at best a twenty-year term of imprisonment and might be released on parole after only seven years.

The Subcommittee leadership commendably offered, and the Committee concurred in, an amendment to increase the maximum term of imprisonment to life for certain offenses involving violence or resulting in, or creating a serious risk of, death where the offender "manifests extreme indifference" to human life. While this is certainly movement toward fulfilling our treaty obligations, it simply does not go far enough. Nuclear terrorists must be faced with the harshest penalty and greatest deterrent to criminal activity available under our Constitution. For that reason, we supported an amendment offered in Committee by the gentleman from Wisconsin (Mr. Sensenbrenner) which would have provided the alternate penalty of death under certain circumstances.

On its face, current, federal law provides for the death penalty in connection with a multitude of offenses, such as train wrecking and bank robbery where death results, which come nowhere near the level of danger posed by those created in H.R. 5228. The most analogous offense is air piracy, which involves threats to the lives of "only" hundreds, rather than thousands and/or millions. In 1974, in an effort to deter dangerous hijackings, and pursuant to a similar convention, the Congress made that offense punishable by life imprisonment or death, "where death results." 18 U.S.C. 1472(i), (n). Constitutionally prescribed procedures were mandated for the imposition of capital punishment. 18 U.S.C. 1473(c). Our amendment, based on a bill reported by the Senate Judiciary Committee, sponsored by its Chairman, and enthusiastically endorsed by the Administration, sets up similar procedures and is designed to comply with Supreme Court cases handed down since 1974. In particular, it requires a life-endangering state of mind on the part of the offender, as well as resulting death. We believe that it complies with the dictates of fundamental fairness in every respect.

We do not subscribe to the view that the death penalty should not be imposed under any circumstances. The suggestion that it is *per se* unconstitutional has been soundly repudiated by the Supreme Court on so many occasions that even the most tenacious proponent of that view ought finally to be convinced. While reasonable people may disagree on the extent to which the death penalty discourages "heat of passion" crimes, commonsense suggests that it will have a deterrent effect on the perpetrator of a calculated homicide in more cases than not. This certainly seems to have been the case in connection with airline hijackings. Furthermore, where the crime is particularly heinous, as these are by their very nature, the death penalty serves the important function of meting out justice and discouraging vigilantism.

During Committee debate, some opponents of the death penalty amendment voiced objection that its inclusion in H.R. 5228 would spawn controversy and thus endanger passage of this worthy legislation. This same argument was proffered in connection with Criminal Code reform two long years ago. At that time, the Committee acceded to that approach, with the understanding that the death penalty would be considered in connection with the individual pieces of legislation. The offenses created in H.R. 5228 present the most compelling case imaginable for the ultimate penalty. We thoroughly disagree with any contention that it should not be considered at this point, particularly since public support for capital punishment is at its highest level in three decades.

Nuclear terrorism is no longer a mere nightmare, but a real possibility. It is therefore incumbent upon us to show the cold-hearted, calculating fanatics, whose contempt for human life knows no bounds, that the United States intends to fight them with the same strong measures, determination and success which it brought to bear on hijackers during the 1970's. The Committee's decision to spare nuclear terrorists from the prospect of the death penalty makes H.R. 5228 a mere slap on the wrist. The bill should be brought to the floor of the House under an open rule so that our colleagues will have an opportunity to debate and vote on this important issue.

F. JAMES SENSENBRENNER, Jr.
SAM B. HALL, Jr.
CARLOS J. MOORHEAD.
THOMAS N. KINDNESS.
BILL MCCOLLUM.
E. CLAY SHAW, Jr.

DISSENTING VIEWS OF MESSRS. KINDNESS AND SENSENBRENNER ON H.R. 5228

We certainly share the Committee's sentiment that Congress should act promptly to implement the Convention on the Physical Protection of Nuclear Material by enacting appropriate criminal laws. The need for legislation was amply demonstrated in the Subcommittee's hearings and has been vigorously urged by the Administration. Unfortunately, in an effort to act expeditiously, this Committee has created a nightmare for both the prosecution and defense. As reported, H.R. 5228 is so complicated and vague that it may ultimately defeat the purpose for which it was devised. Reconstructive efforts are therefore imperative if we are to fulfill our treaty obligations.

Although much of the Committee's debate focused on the propriety of considering the death penalty, questions and objections concerning various drafting problems in the bill consumed an inordinate amount of time. One of the more glaring problems involves the various states of mind required, and not required, in connection with what is perhaps the most crucial offense in the bill. H.R. 5228, if enacted, would add a new Section 831(a)(1)(A) to Title 18 of the United States Code which would make it a federal offense if any person, "without lawful authority, intentionally receives, possesses, uses . . . disposes of, or serious bodily injury to any person or substantial damage to property." No criminal state of mind is required on the part of the defendant with respect to the fact that his possession is without lawful authority or with respect to any resulting damage. Thus, if an individual unwittingly came into unlawful possession of prohibited nuclear materials and attempted to dispose of them in a good faith effort to remedy the situation, he would be subject to harsh criminal penalties where accidental damage resulted. Surely the drafters did not intend to encompass this sort of activity in their effort to punish calculating nuclear terrorists.

The most serious defect in the bill was added by the Committee in an effort to include in H.R. 5228 more appropriate penalties. While the Committee's good intentions in attempting to impose life imprisonment in the most egregious cases are commendable, those intentions are unfortunately misplaced in a morass of confusing, duplicative and messy drafting. Life imprisonment may only be imposed for the most dangerous offenses in the bill where the government proves three states of mind on the part of the defendant. He must "knowingly" engage in conduct, "recklessly" cause death or serious bodily injury, and act under circumstances "manifesting extreme indifference to the life of an individual." While, under certain circumstances, some of these requirements might be appropriate in an omnibus Criminal Code reform measure, it is an entirely different matter to insert them piecemeal outside that context.

Although the prosecution is faced with a mighty burden in terms of quantity of elements to be proved in connection with sentencing, the amendment also raises a question of fundamental fairness from the defendant's point of view. Nowhere does it require any intentional act on his part. As a result, it comes perilously close to punishing negligent conduct with penalties more appropriate to deliberate activity. By contrast, the death penalty amendment rejected by the Committee at least required, in addition to resulting death, a specific intention on the part of the defendant to kill, inflict serious bodily injury or create a grave risk of death to another person.

H.R. 5228 revises the Administration's proposal by incorporating some of the drafting improvements and conventions used in the Criminal Code reform measure reported by this Committee two years ago (H.R. 6915) and reintroduced in this Congress in endless variation. As sponsors of such bills and participants in the frustrating quest to revise the Code, we support the improved organization and clarity which the Code conventions can facilitate. However, H.R. 5228 highlights the urgent need for omnibus reform and the dangers of using those conventions in a vacuum. For instance, the absence of a state of mind with respect to results in Section 831(a)(1)(A) would not present problems in an omnibus bill because of the inclusion of general rules governing unspecified states of mind. Two interpretations of this provision are possible. The court could decide that the Congress specifically intended to exclude a state of mind with respect to results in Section 831(a)(1)(A) since it chose to include that requirement in another connection. On the other hand, a court familiar with the reform effort might attempt to apply one of the general rules.[1] The potential for confusion is immense.

Because of the worthwhile goals behind the bill, it is with the greatest reluctance that we oppose H.R. 5228 as reported by the Committee. If we are truly to achieve those goals, the bill absolutely must be considered on the floor of the House under an open rule and with adequate time for debate. Otherwise we have missed our opportunity to deal with nuclear terrorists in a responsible and effective manner.

THOMAS N. KINDNESS,
F. JAMES SENSENBRENNER, Jr.

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[1] Under Section 302(b) of H.R. 1647, the state of mind as to results, where unspecified, is the state of mind with respect to conduct. This is similar to the approach of the Brown Commission and the Model Penal Code. See, H. Rept. No. 96-1396 at 34. The Senate, by contrast, applies a "reckless" state of mind to results, where unspecified. See, e.g., S. 1630, § 303(b).

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